

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MELINDA STERLING-STEWART

Claimant

VS.

U.S.D. 457

Respondent

AND

KANSAS ASSOC. OF SCHOOL BOARDS

Insurance Carrier

Docket No. 1,003,511

ORDER

Claimant requested review of the February 11, 2004 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Appeals Board (Board) heard oral argument on August 24, 2004.

APPEARANCES

Seth G. Valerius, of Topeka, Kansas, appeared for the claimant. Anton C. Anderson, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that the depositions of Matt Ellis and Kathleen Whitley should be considered part of the record.¹

¹ Through no fault of either party, these depositions were not submitted to the ALJ prior to her issuance of her Award. At oral arguments before the Board the parties agreed that the Board could go forward and decide the matter considering the evidence that was not made available to the ALJ.

ISSUES

The sole issue on appeal is the claimant's average weekly wage. Claimant contends the ALJ erred in not including the wages she earned under her employment contract with respondent for the 2000-2001 school year as well as her additional contract for coaching services. Claimant contends that the aggregate wages from each of those sources would qualify her for the maximum weekly benefit rate of \$417.

Respondent argues that the ALJ was correct in not including the claimant's coaching and teaching contract into the average weekly wage calculations. Both of those contracts had been fulfilled and claimant was performing services for respondent under a separate verbal contract which paid her an average weekly wage of \$190. Thus, the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's award should be affirmed.

During the 2000-2001 school year claimant was employed as a 5th grade teacher. Claimant's contract commenced August 18, 2000 and ended May 25, 2001. Claimant elected to have her wages paid over a 12 month period, but all services as a teacher ceased as of May 25, 2001. In addition to her duties as a teacher that school year, claimant entered into a contract to be the 8th grade girls basketball coach. This supplemental contract was entered into on August 23, 2000 and spanned the basketball season which ended in March when the team was eliminated from the state playoffs.² She asked that these wages be paid over a 12 month period as well.

In April 2001, claimant was approached about serving as the assistant coach for the high school basketball team. However, that position would not be effective until August 2001. In the meantime, claimant was asked to provide services for two weeks in the summer. She was asked to open the gym and work with some of the high school basketball players. Apparently Mr. Ellis, her supervisor and the head basketball coach, was unavailable for a period of time and she was asked to substitute for him. Although claimant knew she would be working more than 2 hours per day, she agreed to the \$19 per hour rate for a maximum of 2 hours per day. The funding for this summer program is separate and apart from teaching or coaching salaries.

Claimant believed that participating in this program was necessary as she was anticipating her position as assistant coach for the high school basketball team. Mr. Ellis

² Ellis Depo. at 5.

confirms that he expected her to participate in this program as he knew claimant to be a loyal and cooperative employee.

There is no dispute that claimant sustained a compensable injury on July 18, 2001 while working at the basketball camp and that as a result she has a permanent partial impairment of 21 percent to the right lower extremity. The only dispute is the appropriate methodology to be used to calculate her average weekly wage.

While claimant elected to receive her wages for the 2000-2001 school year over a 12 month period, she had nevertheless completed all of her contractual obligations under both her teaching contract and her supplemental coaching contract. All of her duties had ceased as of May 25, 2001. Although claimant's counsel argues that this case is distinguishable from *Buckridge v. U.S.D. 253*,³ the Board disagrees.

Much like the claimant in *Buckridge*, claimant was not performing any of her contractual duties at the time of her injury, other than those required under a separate, verbal agreement which paid her \$19 per hour for 10 hours per week. Claimant was not acting as a teacher when she was injured. She was not acting as a coach under any contract when she was injured. She certainly had an expectation that she would be the assistant coach during the 2001-2002 school year, but that expectation does not somehow incorporate the terms, conditions and salary of a prior employment contract or one that she anticipated would be offered. Accordingly, the Board finds the ALJ appropriately excluded any wages generated by those separate contracts.⁴

Claimant's duties during the summer were part time in nature and the relevant statute for determining her average weekly wage is K.S.A. 44-511(b)(4)(A) and (b)(5). The Board has reviewed the ALJ's Award along with the evidence and concludes the ALJ appropriately calculated the claimant's average weekly wage as a part time-employee to be \$190.

Because the parties agree that the transcripts of Matt Ellis and Kathleen Whitley are to be considered part of the record, the ALJ's Award should be modified to include the expense associated with the taking of those depositions.

All other findings and conclusions contained within the ALJ's Award are affirmed to the extent they are not modified herein.

³ *Buckridge v. U.S.D. 253*, No. 244,508, 2000 WL 623076 (Kan. WCAB Apr. 25, 2000).

⁴ See *Lynch v. U.S.D. No. 480*, 18 Kan. App. 2d 130, 850 P.2d 271 (1993).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated February 11, 2004, is affirmed.

In addition, respondent is ordered to pay the costs of the depositions for Matt Ellis and Kathleen Whitley. The amounts are as follows:

Donna L. Creel, RPR Deposition of Matt Ellis	\$132.00
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Donna L. Creel, RPR Deposition of Kathleen Whitley	\$92.00
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IT IS SO ORDERED.

Dated this _____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Attorney for Claimant
Anton C. Anderson, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director